United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1470

To be argued by
IRWIN KLEIN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B P/s

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH SETTER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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CASES CITED

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

§ 812. Schedules of controlled substances—Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative or preparation of opium or opiate.

RULE, CRIMINAL PROCEDURE

Rule 41. *Search and Seizure.*

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

CONSTITUTIONAL AMENDMENT

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 76-1470

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH SETTER,

Appellant

BRIEF FOR APPELLANT

Statement

On July 3, 1975, the appellant was arrested by federal agents with drawn guns outside of his house, in the driveway, for his alleged involvement in two previous sales of cocaine. (A13, A18, A24, A39, A58, A59, A196, A197, A199).

He was searched for weapons, but was found to be unarmed. (A30, A59, A180). At the time of his arrest, he was not warned of his right to refuse to consent to a search. Thereafter, the agents escorted him into the house, a warrantless search was conducted of the interior of the premises. (A19, A20, A40, A41, A43, A44, A45, A47, A57) The appellant thereupon opened a file cabinet and turned over a quantity of cocaine (A19,A41). The agents testified as to a variety of purported reasons for entering the house, such as to permit the appellant to feed the cat, or make a telephone call. (A12, A207, A262)

The appellant was subsequently indicted for such possession and also for the two prior sales of cocaine and the incidental possession thereof. (A5)

Significantly, Count Five is defective because of the omission of the word "intentionally" in connection with possession. (A6) This was not discovered until after the judge had read the indictment to the jury as part of his charge. (A760)

A suppression hearing was held as to the seizure subsequent to appellant's arrest and the motion was denied. (A7 - A72) Not until well into the trial and after the conclusion of the suppression hearing, was it disclosed that the reason the agents entered the house after the arrest was to obtain the cocaine. (A606, A607, A620, A621)

Such motion to suppress was renewed upon ascertaining that one of the reasons for entering the house was to obtain the cocaine and again, the motion was denied. (A614, A620, A621, A622)

A motion to dismiss the possession count (Five) because of a defect in the indictment which alleged such possession to be "intelligent" (A6, A760), but did not allege such possession to be "intentional" as required by the statute (A6, A760), was denied during the course of the trial and prior to submission to the jury (A760). When the jury withdrew in order to deliberate on the charges, they were permitted to view the cocaine recovered from appellant's home in the jury room, over objection. (A763)

Although the cocaine was evidence relevant to such possession count (Five), it had not been offered into evidence as proof of appellant's involvement in the two sales of cocaine. Nevertheless, the prosecutor was permitted in summation, to argue to the jury, that it could infer guilt as to the sales merely because of the possession of the seized cocaine after the arrest. (A656, A657, A658, A709, A710)

The original motion to dismiss count Five of the indictment was eventually granted (A770) but only after such seized cocaine had been delivered to the jury room and the jury had returned a verdict of guilty as to the entire indictment. (A768, A769)

Appellant was so found guilty in the Eastern District Court of New York after a jury trial before Honorable Henry Bramwell and sentenced to seven (7) years imprisonment on Count One, plus a special parole term of five (5) years. Sentences on Counts Two, Three and Four are to run concurrently therewith. (A774).

Appellant is at liberty under $5,000.00 cash bail. It should be noted that the appellant relied upon the defense of alibi as to the two sales and incidental possession covered by the first four counts. Obviously such defense did not extend to Count Five, as to which the appellant contends that the denial of suppression of the seized cocaine was erroneous.

ISSUES PRESENTED

1. Whether the belated and tardy dismissal of Count Five, after the jury had deliberated and returned a verdict of guilty as to all counts, caused and resulted in a spill-over and contamination of the other counts?

Appellant says "Yes!"

2. Whether the trial judge should have granted the motion to dismiss Count Five because of the defective and insufficient wording thereof, at the time such motion was made prior to submission of the case to the jury for deliberation?

Appellant says "Yes!"

3. Whether the motion to suppress should have been granted, in which event the contamination of the other counts by evidence seized under Count Five, would have been avoided?

Appellant says "Yes!"

4. Whether the search inside the appellant's house, after his arrest outside the house, was incident to such arrest?

Appellant says "No!"

5. Whether the handing-over of the cocaine by the appellant, who was under arrest at the time and who had not been advised of his right to object to such warrantless search, was a voluntary consent, rather than a submission to police authority, under the totality of all of the circumstances?

Appellant says "No!"

6. Whether the permitted reference by the prosecutor in summation to the effect that the jury could infer guilt as to the first four counts solely from the possession of the narcotics subsequently seized under Count Five was erroneous?

Appellant says "Yes!"

7. Whether Agent Ebert's grand jury testimony, which was inconsistent with and repugnant to his testimony at the suppression hearing was exculpatory and constituted Brady matter?

Appellant says "Yes!"

8. Whether there was sufficient, if any, evidence, that the appellant made the purported sale of narcotics to the informant on April 17 under counts one and two; to warrant submission to the jury?

Appellant says "No!"

POINT I

It was Reversible Error to Permit the Jury to Examine the Cocaine in the Jury Room.

It is reversible error to permit the jury to consider items which have not been admitted, or have been erroneously admitted, into evidence. The cocaine exhibited at trial and in the jury room had no connection with the counts of the indictment for the two prior sales of narcotics. Its presence, and the likelihood of a prejudicial effect on the verdict, require reversal.

The general rule is that only exhibits which have been received in evidence may be exhibited to the jury during its deliberations. The rationale for this rule is to avoid any prejudice which will deprive the defendant of a fair and unbiased verdict. As the Second Circuit stated in United States v. Adams, 385 F.2d 548 (2d Cir. 1967):

> The principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted.

385 F.2d at 551-52 (citations omitted).

In the Adams case, the Second Circuit reversed a conviction for the sale of narcotics. The basis for the reversal was the fact that the jury, in the course of its deliberation, had seen incriminating writings

made by narcotics agents who allegedly purchased cocaine from the defendant. These writings had not been received in evidence during the course of the trial. In the interests of a fair verdict, the conviction was overturned.

In United States v. Camporeale, 515 F.2d 184 (2d Cir. 1975), counsel had agreed to permit the jury to view the defendant's grand jury testimony during their deliberations in a trial for perjury. One condition, however, was that the testimony be submitted only after a reference to the defendant's past criminal record was deleted. The judge issued instructions to the court clerk to this effect. The clerk failed to make the deletion, and the unedited transcript went into the jury room. On appeal, the defendant's conviction was reversed. Whether the jury actually read the reference to the defendant's record was immaterial. The fact that they could have read it, and that such information was likely to prejudice the verdict, was sufficient cause for reversal. See also United States v. Shafer, 455, F2d. 1167 (5th Cir. 1972); Dallago v. United States, 427 F2d 546 (D.C. Cir. 1969).

Just as exhibits which have not been admitted into evidence may not be subject to jury consideration, it also constitutes error to allow the jury to consider evidence which has been improperly admitted. See United States v. Parker, 491 F.2d 517 (8th Cir. 1973); Bowers v. Coiner, 309 F. Supp. 1064 (D.W. Va. 1970). Under either set of circumstances, the jury has been allowed to consider evidence to which

it should not have had access while deliberating.

The facts of the present case illustrate a third situation where the jury has been allowed to consider evidence which should not have been before it. The cocaine which was viewed in the jury room in the present case was received only with regard to the possession charge, (Count five). Its presence was likely to be influential in the jury's verdict on the two prior sale charges and related possession as well, however. Because of the "slightest possibility that harm could have resulted" in the form of a biased verdict, the conviction should not be allowed to stand. The exhibit which the jury had in its possession could hardly have been more prejudicial. Access to a quantity of cocaine which the appellant was alleged to have had in his possession at the time of the arrest obviously tended to convince the jury that the appellant was a trafficker in cocaine. Since the possession charge was dismissed, however, there was no justification for the presence of the exhibit in the jury room. Under these circumstances, the appellant did not receive a fair trial on the two prior sale charges and related possession and the conviction must be reversed.

The cocaine should have been excluded for either of the two reasons:

a) it should have been suppressed as the result of an unlawful search and seizure; or

b) the motion to dismiss Count Five because of defective pleading (A760, A763) should have been timely granted prior to submission to the jury.

Another cogent reason for exclusion of the cocaine is the prejudicial nature of such evidence in a jury room and the likelihood of spill-over as to the other counts of two prior sales and incidental possession.

The belated granting of the defense motion to so dismiss Count Five, after the jury verdict resulted in the contamination of the verdict as to the first four counts be reason of spill-over (A770, A771, A772, A773).

Moreover, such obvious contamination received express support from the judge when he permitted the prosecutor to tell the jury in summation that they could consider the appellant's possession of cocaine on July 3, 1975 as bearing upon the issues of whether he was guilty of the two prior sales (A705, A706).

Not only is such reasoning an inference based upon an inference, but the Fifth Count has been so closely interviewed with the first four counts by the prosecutor, that if the Fifth Count is defective as it has been held, then the other counts must also fail.

In any event, the permissive invitation to the jury to convict as to the first four counts because of undisputed possession under Count Five, is reversible error and appellant was deprived of dur process and confrontation by reason thereof.

This is accentuated by the fact that as to Count Five, there was no defense other than illegal search and seizure. The defense of alibi only applied to and extended through the first four counts.

At one time, appellant was ready to sever and plead to Count Five and reserve his right to appeal the denial of his motion to suppress and proceed to trial as to counts one, two, three and four. (A649, A650, A651). However, the prosecution refused to consent thereto unless the prosecution was permitted to argue to the jury to infer that appellant was guilty of the two prior sales merely because of his possession of the cocaine in Count Five. (A656, A657). The judge stated he would permit such reference to the cocaine (A657), notwithstanding the warning by defense counsel of a mistrial on appeal by reason of spill-over. (A658). Nonetheless, the prosecutor glibly stated:

"That would be the risk I would take then" (A658)

We now ask for dismissal of the first four counts by reason of such reversible error which denied the appellant of a fair trial.

POINT II

The Cocaine Should Have Been Suppressed as Evidence Obtained in the Course of an Illegal Search of the Appellant's Home, in that the Search was not Incident to the arrest.

Counsel is aware that Count Five was dismissed by the trial judge. The reason for the inclusion of this point as well as point III, is to furthur substantiate point I, in that, had the motion to suppress been granted, there would not have been any spill-over onto or contamination of the first four counts, by and from the admission of the seized cocaine and references there to the jury.

A search conducted without a warrant is considered per se unreasonable. In such situations, the prosecution has the burden of proof on the issue of whether the search was justified by one or more of the several exceptions to the warrant requirement.

The search made in the present case was beyond the scope of a search incident to an arrest. Supreme Court decisions have held that the scope of such a search is limited to the area within the immediate control of the subject--that is, the vicinity from which the subject might obtain a weapon or destroy evidence. When the defendant was arrested outside his house, the interior of his house was not within the area of his immediate control. The search, therefore, cannot be justified as a search incident to an arrest.

The Supreme Court has specifically ruled against the validity of a house search when the arrest takes place outside the house. In Chimel v. California, 395 U.S. 752 (1969), the Court held inadmissible evidence obtained as a result of a search of the defendant's four-room house at the time of his arrest. The scope of a warrantless search incident to an arrest was limited to the area within the defendant's "immediate control." This area of "immediate control" constituted only the vicinity from within which an arrestee might obtain a weapon or destroy evidence. Id. at 763.

In another case decided on the same day as Chimel, the Supreme Court applied its test for the scope of a valid search incident to an arrest to a fact pattern similar to the case at hand. In Shipley v. California, 395 U.S. 818 (1969), police had taken informed that the defendant was involved in a robbery. After searching the defendant's house woth the consent of a 15 year-old girl who claimed to be his wife, the officers waited for him to return. The defendant was arrested as he alighted from his car, which he parked 15 to 20 feet from his house. Without a warrant, and with no permission to conduct a second search, the police again searched the house. Incriminating evidence was obtained during the second search.

The Supreme Court reversed the defendant's conviction for first degree robbery. Following the standards set forth in Chimel, the Court concluded that the search of the house

after the arrest was beyond the scope of a search of a search incident to an arrest. The Court also noted that, even if the Chimel test had no retroactive application,

> the Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search.
>
> 395 U.S. at 820

During the following term, the Supreme Court confronted a similar set of circumstances. In Vale v. Louisiana, 399 U.S. 30 (1970), police observed a known narcotics violater stop his car in the driveway of the defendant's home. As the defendant came outside to meet him, the police moved in for an arrest. The defendant was arrested on the doorstep of his home. The police then, without a warrant, searched the house. On appeal, the Court reversed the conviction, ruling that the search of the house was beyond the area within the defendant's immediate control. The evidence recovered from that search could not, therefore, be admissible under the search incident to an arrest exception for warrantless searches.

The Chimel test, As applied in Shipley and Vale, has been followed in the lower federal courts. In United States v. Thompkins, 405 F. Supp. 1104 (S.D.N.Y. 1975), searches

incident to arrests were strictly limited to what was reasonably required to assure the officer of his personal safety. And in United States v. Jackson, 533 F.2d 314 (6th Cir. 1976), the Sixth Circuit concluded:

> Belief, however well founded, that articles are concealed inside a dwelling house, does not justify a search without a warrant. The arrest must be made inside the house.
> 533 F.2d at 319.

The Court in United States v. Erwin, 507 F.2d 937 (5th Cir. 1975), in invalidating the search, stated that "aside from the cursory search for other persons, there is no justification for 'routinely searching any room other than that in which an arrest occurs'."

There is ample authority, therefore, to support the contention that the warrantless search of the appellant's home was not incident to his arrest, and that the cocaine should have been suppressed. It is clear that the appellant was outside his home when he was arrested. The Vale case indicates that it makes no difference whether he was entering or leaving his house. As long as the interior of his home was not within his area of immediate control, it was beyond the scope of a search incident to his arrest.

POINT III

The Cocaine Should Have Been Suppressed as Evidence Obtained In the Course of an Illegal Search of the Appellant's Home, in that the Search was Not Conducted with Appellant's Consent.

A more diffucult issue is whether the appellant voluntarily consented to the search.

The voluntariness of a serach is tested by evaluating the totality of all the circumstances. The absence of any warnings by the police as to his right to refuse to consent, as well as the fact that he was in custody, militate against a finding of voluntariness. It is amply demonstrated that these and any other coercive factors outweigh any noncoercive factors--such as the appellant's surrender of the cocaine present in this case.

We submit that under all of the surrounding circumstances, there was no voluntary consent to the search. The voluntariness of a consent to a search is generally determined by an examination of the "totality of all the circumstances" surrounding the incident. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Here, it is clear that the appellant was not informed of his right to refuse to consent to the search.

In Schneckloth, the Supreme Court held that the failure to advise a person of his right to refuse consent to a search is a factor to be considered in determining the voluntariness of the consent, but it

is not determinative. This holding was limited to cases where the subject of the search was not in custody. However, the strong trend has been to apply it to custodial searches as well. Cf. United States v. Heimforth, 493 F.2d 970 (9th Cir. 1974) cert. denied, 94 S. Ct. 1615, where although the fact that the defendant had not been warned of his right to refuse to consent to a search was held not to be solely determinative of the voluntariness of his consent given after he had been arrested. Nevertheless, the court held that under all the circumstances such consent was involuntary. See also Annot., "Validity of Consent to Search Given by One in Custody of Officers," 9 A.L.R. 3d 858 (1966).

Counsel is aware that the Second Circuit, adhering to the general trend, has refused to recognize a rule requiring a warning as to fourth amendment rights before a valid consent may be given. See United States v. Mapp, 476 F.2d 67 (2d Cir. 1973); United States ex rel. Combs v. LaVallee, 417 F.2d 523 (2d Cir. 1969), cert. denied, 397 U.S. 1002 (1970); United States v. Marotta, 326 F. Supp. 377 (S.D.N.Y. 1971).

However, in considering whether the consent was voluntary, police custody is a factor that must be considered, and the increased possibility of coercion increases the government's burden of proof.

See Hayes v. Cady, 500 F.2d 1212 (7th Cir. 1974), United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973), United States v. DeMarco, 488 F.2d 828 (2nd Cir. 1973).

Although not requiring warnings in every case, the Second Circuit has held that the failure to warn may be pertinent to or indicative of non-voluntariness, where the defendant consented to a search after a night-time arrest by armed law enforcement officers. United States v. Mapp, 476 F.2d 67 (2nd Cir. 1973).

Hence, knowledge of the right to refuse consent is a factor to be considered within the "Totality of all the circumstances" in evaluating the voluntariness of consent. See Schneckloth v. Bustamonte, supra. Some additional factors include the coercive nature of police questioning, the capacity or vulnerability of the defendant to the methods used in obtaining consent, the custodial nature of the search, and the general environment in which the defendant gave consent. See United States v. Bryant, 406 F. Supp. 635 (E.D. Mich. 1975).

That court stated that some of the factors to be considered in determining whether a consent to search was freely and voluntarily given are:

1) did the defendant know he had the right to refuse consent;

2) was the defendant affected by subtly coercive police questions;

3) how vulnerable was the defendant to the method used in obtaining consent;

4) whether the defendant is considered to be in custody;

5) the environment in which the defendant gave consent."

Misrepresentation of authority to search also militates against the voluntariness of consent. Bumper v. North Carolina, 391 U.S. 543 (1968). See also Bolger v. United States, 189 F. Supp. 237 (S.D.N.Y.), aff'd, 293 F.2d 368 (2d Cir. 1960), rev'd on other grounds, 371 U.S. 392 (1961).

In the present case it is clear that the absence of a warning that he could refuse to consent to such search, may have vitiated the appellant's consent. In addition, the fact that he was under arrest at the time is

> a factor militating against a finding of consent because after arrest a subject is more susceptible to possible duress of coercion.

United States v. Jones, 475 F.2d 723, 730 (5th Cir.), cert. denied, 414 U.S. 841 (1973). It appears that consent her was not freely given. The mere fact that the appellant opened the file cabinet, took out the cocaine and handed it over and surrendered it, is merely an isolated circumstance, and in any event, when evaluating the totality of the circumstances, the coercive factors outweigh the noncoercive ones.

Significantly, during the course of the trial and subsequent to the completion of the syppression hearing, counsel was made privy to the grand jury testimony of Agent Ebert, one of the arresting officers on July 3rd, the day of the seizure. Therein, Agent Ebert had testified that one of the reasons for entering the appellant's home after the arrest was to obtain the surrender of the cocaine in the house. (A606, A607, A620, A621)

In other words, the purpose of entering the house after the outside arrest was to search for and seize the cocaine. This contradicted Agent Ebert's prior testimony at the suppression hearing that the question as to whether the appellant had any narcotices in the house, was not made until after entry into the house. (A65). This witness was called in response to the request of the judge for the testimony of an additional witness in order to rule upon the motion to suppress: (A53), and the judge relied on and was impressed by his testimony in denying the motion to suppress (A71, A72, A629). The judge admitted that Ebert's grand jury testimony might be Brady material, but denied the defense motion based thereon (A629, A630, A631).

Had this fact been made known by the prosecution during the suppression hearing pursuant to the mandate of BRADY (A629, A630, A631), it is conceivable that the cocaine would have been suppressed as evidence.

In any event, isn't this fact that the agents entered the house after the arrest to obtain the cocaine, another coercive factor in the overall picture of non-voluntary consent?

Appellant merely submitted to police authority. (A40, A41, A42, A43, A45).

POINT IV

Counts One and Two Should hve been Dismissed as a Matter of Law upon the Grounds that there was No Proof Adduced that the Appellant sold Cocaine to Rosenberg, The Informant on April 17, 1975; and in any event, the Cocaine Purportedly Sold, the Tape and Transcript should not have been Admitted into Evidence.

On April 17, 1975

Agents equipped with a Kel receiver waited in a car near appellant's house. Rosenberg, the informant went into the house with money and came out with the cocaine. (A71a, A72a, A125, A126, A128, A145, A146, A174, A175, A228, A229, A266, A267, A269, A293) He did not testify. No one was present to observe the purported sale. The proffered testimony of the agent as to what Rosenberg had told him was excluded as hearsay. There was no actual identification of appellant's voice on the tape. (A369, A366, A367, A368, A369, A370, A371, A372, A373, A374, A396, A397, A3999, A400, A402)

The testimony of the prosecution witnesses indicated that they merely assumed the voice on the Kel Transmitter speaker to Rosenberg was that of the appellant and that they could not independently identify the appellant's voice. (A366, A367, A371 A372, A373, A399, A400, A417, A418) In fact, Officer Restivo, who was familiar with the appellant's voice, was made a prosecution witness, but testified in response to the prosecutor's question, that the voice on the April 17th tape was not the appellant's. (A437, A438, A441)

Although the judge repeatedly held that there was no proof

that the appellant made such sale to the absent informant, he nevertheless admitted such cocaine, tape and transcript into evidence and refused to dismiss counts one and two (A77, A185, A186, A187, A188, A310, A312, A313, A314)

Inasmuch as the appellant was sentenced only on Count I (A774) reversal as to such count would be tantamount to a reversal of the entire indictment.

CONCLUSION

The judgement of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

IRWIN KLEIN
(C.J.A.) Attorney for Defendant Appellant

EXHIBIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

-against-

JOSEPH SETTER,

Defendant.

----------X

The defendant moves this Court for an order setting aside and vacating the verdict of guilty in this case. Specifically, but without limitation the defendant contends as follows:

POINT I

The presence of Count 5 of the indictment which was not dismissed until after the verdict of the jury had been returned contaminated the other counts of the indictment inasmuch as the sole defense of alibi applied only to the first four counts and did not extend to Count 5.

POINT II

The submission and presence of the quantity of cocaine in the jury room which was seized under count 5 while the jurors were deliberating interferred with and precluded the exercise of discretion by the jurors in considering the guilt or innocence of the defendant.

IRWIN KLEIN • ATTORNEY AT LAW • 400 MADISON AVENUE • NEW YORK, N. Y. 10017

POINT III

The seized cocaine referred to in count 5 should have been suppressed at the commencement of the case and certainly prior to submission of the case to the jury, upon all of the grounds previously set forth, specifically, but without limitation, the fact that the search by the officers of the interior of the premises at gunpoint occurred after the prior arrest of the defendant outside of the premises and constituted an illigal search, and furthermore, the surrender of the cocaine to the authority of law enforcement officers did not constitute a consent to such unlawful search.

POINT IV

The taped conversation as to the first possession and sale contained in counts one and two should have been suppressed and those counts dismissed because of the absence of any proof whatsoever of identification of Mr. Setter's voice. There is no proof that he was in the house or that he was alone in the house at the time; in fact my recollection is that the evidence indicated that another person was present during the time and who was seen to have entered prior and left the premises after the alleged transaction.

Respectfully submitted,

IRWIN KLEIN
Attorney for Joe Setter

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by Paula Jaramillo

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